UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Carville Energy LLC

v. Docket No. EL04-20-000

Entergy Services, Inc.

ORDER ESTABLISHING HEARING PROCEDURES

(Issued May 17, 2007)

1. In this order, the Commission sets for hearing a complaint filed by Carville Energy LLC (Carville) against Entergy Gulf States, Inc. and Entergy Services, Inc. (collectively Entergy) requesting that the Commission reclassify certain facilities and order Entergy to provide transmission credits for the costs of the facilities.

I. Background

2. Carville owns and operates a 517 MW generating facility located in St. Gabriel, Iberville Parish, Louisiana (St. Gabriel Facility). On January 14, 2000, Carville entered into an interconnection and operation agreement (IA) with Entergy to connect the St. Gabriel Facility with Entergy's transmission system. The IA was accepted pursuant to delegated authority.[1] The IA identified certain facilities in that agreement as interconnection facilities and directly assigned the cost of these facilities to Carville. The IA was later amended to provide for generation imbalance service, and the resulting

[1] *See* Entergy Services, Inc., Docket No. ER00-1622-000 (March 16, 2000) (unpublished letter order).

amended interconnection and operating agreement (Amended IA) was also accepted pursuant to delegated authority.[2]

II. Complaint

3. On November 13, 2003, Carville filed a complaint alleging that Entergy had erroneously classified certain interconnection upgrades as direct assignment rather than network facilities. Carville asserts that, consistent with Commission policy, Entergy should not be allowed to directly assign to Carville the cost of the upgrades, which are located beyond the point of interconnection with the Entergy transmission network.

4. In support, Carville points to *Duke Hinds II*, where the Commission found that certain existing Entergy facilities are integrated transmission facilities and are properly classified as network facilities, even though they had been previously classified erroneously; the fact that these facilities were classified as interconnection facilities in the original IA does not transform them into non-network facilities.[3] Therefore, Carville requests that the Commission direct Entergy to reclassify the facilities and provide Carville credits for the costs associated with the facilities, together with interest, from the date of the Commission order.

5. Carville argues that the terms of the Amended IA permit it to bring its complaint, noting that Article III, Section M provides:

> Nothing contained here shall be construed as affecting in any way the right of Entergy or Carville to unilaterally make application to the [Commission] for a change in rates, terms or conditions of service under section 205 of the [FPA] ….”[4]

Carville maintains that the omission of reference to section 206 of the FPA is a drafting oversight and that Carville’s reservation of section 206 rights is implicit in this provision, as *both* parties reserved their unilateral rights to seek changes.

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[2] *See* Entergy Services, Inc., Docket No. ER00-2212-000 and ER00-221-001 (June 13, 2000) (unpublished letter order).

[3] *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 at P 28 (2003) (*Duke Hinds II*), *order on reh’g*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

[4] Carville Amended IA, Article III, section M.

6. Carville also states that it opted into the Entergy standard form interconnection and operating agreement (Standard Form IA) via a letter dated November 12, 2003 (November 12 Letter), and that Article V, section A of the Amended IA secures its right to do so:

> "Entergy is currently developing a standard form interconnection and operating agreement that it intends to file with the FERC. Entergy intends to use the standard form agreement for all subsequent interconnections. *Carville may amend this Agreement to adopt the standard form agreement*.[5]" (emphasis in original)

7. It points out that section 23.4 of the Standard Form IA clearly preserves parties' section 205 *and 206* rights through the following provision:

> "Nothing contained herein shall be construed as affecting in any way the right of the Company or Customer to unilaterally make application to [the Commission] for a change in rates, terms or conditions of service under sections 205 and 206 of the [FPA]….[6]"

III. Notice of Filing and Responsive Pleadings

8. Notice of Carville's filing was published in the Federal Register, 68 Fed. Reg. 65,694 (2003), with interventions, answers, and protests due on or before December 4, 2003. Entergy filed a timely answer to Carville's complaint (Answer). On December 19, 2003, Carville filed an answer to Entergy's answer (December 19 Answer). On January 5, 2004, Entergy filed an additional answer (January 5 Answer); Carville responded to that on January 12, 2004 (January 12 Answer), and Entergy again responded on January 28, 2004 (January 28 Answer).

9. In its Answer, Entergy contends that the St. Gabriel Facility's costs should continue to be directly-assigned to Carville, as required by the *pro forma* OATT. Entergy states that the reclassification of the St. Gabriel Facility would violate the filed rate doctrine and constitute impermissible retroactive ratemaking. Entergy also asserts that the provision of transmission credits for the St. Gabriel Facility violates the Energy

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[5] Carville Complaint at n.10

[6] Carville Complaint at 6-7

Policy Act, "which imposes upon the Commission a general policy of allocating costs to those who cause such costs to be incurred."[7]

10. Entergy argues that Article III, section M of the Amended IA does not provide Carville with the right to seek modification under section 206 of the FPA, as it is silent as to Carville's section 206 rights. Entergy also disputes Carville's claim that the November 12 Letter converted the relevant agreement in this proceeding from the Amended IA to the Standard Form IA. Entergy states that it and Carville have not engaged in discussions concerning Carville's intent to adopt the Standard Form IA, and no such agreement has been filed for Commission approval. In its December 19 Answer, Carville continues to maintain that the omission of section 206 was a drafting oversight, that the just and reasonable standard is the correct standard in this case, and that its rights to unilaterally seek transmission credits are secured by the Amended IA, the Standard Form IA, or both. It asserts that well-established principles of contract interpretation stand for the proposition that "[a]n interpretation which gives effect to all provisions of the contract is preferred to one which renders a portion of the writing superfluous, useless, or inexplicable. A court will interpret a contract in a manner that gives reasonable meaning to all of its provisions, if possible."[8] It claims that it opted into the Standard Form IA, but also acknowledges that a *pro forma* agreement was never executed and filed with the Commission.

11. In its January 5 Answer, Entergy argues that Carville's December 19 Answer confuses the nature of Carville's section 206 rights, and restates its position that providing transmission credits in this case would violate the filed rate doctrine and the rule prohibiting retroactive ratemaking.

12. In its January 12 Answer, Carville reiterates its argument that it is entitled to prospective relief from "and" pricing based on Commission precedent in *Duke Hinds II* and that transmission credits would not violate the filed rate doctrine or the prohibition on retroactive ratemaking.

13. In its January 28 Answer, Entergy argues that Carville relies on one isolated Commission decision, *i.e.*, *Duke Hinds II,* and that Order No. 2003 grandfathered

[7] Entergy Answer at 15

[8] Carville Answer at 5

interconnection agreements, like the IA in this case, already on file with the Commission.[9]

IV. Discussion

A. Procedural Matters

14. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216(a)(2) (2006), prohibits an answer to an answer, unless otherwise ordered by the Commission. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Commission Determination

15. We find that Carville's complaint raises an issue of material fact that cannot be resolved based on the record before us. Specifically, we cannot determine, based on the record before us and the language of the IA, the intent of Carville and Entergy with respect to their rights to make future modifications, unilateral or otherwise, to the IA (either in an FPA section 205 or section 206 filing). The IA contains the following provision:

> Nothing contained here shall be construed as affecting in any way the right of Entergy or Carville to unilaterally make application to the [Commission] for a change in rates, terms or conditions of service under section 205 of the [FPA] . . . ."[10]

16. Any rights Carville may have to apply to the Commission for a change to this agreement stem from section 206 of the FPA, not section 205. Thus, the provision which expressly grants Carville the right to "unilaterally" request changes "under section 205" cannot be understood without the need to resort to extrinsic evidence to determine the parties' intent. Accordingly, we will set the complaint for investigation, and establish a

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[9] *Standardization of Generator Interconnection Agreements and Procedures,* 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 at P 911 (2003) (Order No. 2003)., *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004), *order on reh'g,* Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, 111 FERC ¶ 61,401 (2005).

[10] Amended IA, Article III, section M.

trial-type evidentiary hearing to address this issue, under section 206 of the FPA. We note that the purpose of this hearing is to address this one issue – the parties' intent with respect to their rights to make future modifications to the IA. We will address the merits of the other issues raised in Carville's complaint (*i.e.*, the appropriate classification of certain facilities and the appropriate cost allocation), once the issue being set for hearing has been resolved.[11]

17. In cases where, as here, the Commission institutes an investigation on a complaint under section 206 of the FPA, section 206(b), as it was in effect at the time that Carville filed its complaint, requires that the Commission establish a refund effective date that is no earlier than 60 days after the date a complaint was filed, but no later than five months after the expiration of such 60-day period.[12] Consistent with our general policy of providing maximum protection to customers, we will set the refund effective date at the earliest date possible, *i.e.*, 60 days after the filing of Carville's complaint, which is January 12, 2004.

18. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. The Commission has not yet issued a decision on the merits in this proceeding because the resolution of the matter depended in the first instance on the Commission's decision in the *Duke Hinds* cases.[13] In that proceeding, which was not resolved until November 17, 2006, the Commission announced its policy regarding interconnection facility cost allocation and transmission credits. Furthermore, the parties failed to express clearly their intent as to their rights to seek modification to the Carville IA. We now anticipate that we will be able to issue a decision in this matter soon after we receive the Initial Decision from the presiding judge in the hearing ordered herein and after any briefs on and opposing exceptions. While we

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[11] We leave to the parties and the administrative law judge resolution of issues concerning Carville's November 12 Letter and the Standard Form IA.

[12] Section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005), to require that in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than five months after the filing of such complaint.

[13] *See supra* n.3.

do not know with certainty the amount of time that may be necessary for the presiding judge to conduct the hearing and issue a decision, we nevertheless estimate that we will be able to issue our decision by July 31, 2008.

19. Today we are issuing an order in Docket No. EL05-21-000 that establishes a hearing on a similar IA between Entergy and Tenaska Frontier Partners, Ltd. If the parties in these proceedings request consolidation and if the Chief Judge finds such consolidation to be reasonable, then we authorize the Chief Judge to consolidate this proceeding with the proceeding in Docket No. EL05-21-000.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held concerning Carville and Entergy's intent with respect to their rights to make future modification to the IA.

(B) A presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) The refund effective date established pursuant to section 206(b) of the Federal Power Act is January 12, 2004.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.